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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/827,192	04/05/2001	Robert Lee Popp	15583	5376
23556	7590	11/13/2003	EXAMINER	
KIMBERLY-CLARK WORLDWIDE, INC.			AFTERGUT, JEFF H	
401 NORTH LAKE STREET			ART UNIT	PAPER NUMBER
NEENAH, WI 54956			1733	
DATE MAILED: 11/13/2003				

Please find below and/or attached an Office communication concerning this application or proceeding.

Action Summary	Application No.	Applicant(s)
	09/827,192	POPP ET AL.
	Examiner	Art Unit
	Jeff H. Aftergut	1733

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

1)  Responsive to communication(s) filed on 06 October 2003 and 20 October 2003.

2a)  This action is **FINAL**.                            2b)  This action is non-final.

3)  Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

4)  Claim(s) 1-35 is/are pending in the application.  
    4a) Of the above claim(s) 19-35 is/are withdrawn from consideration.

5)  Claim(s) \_\_\_\_\_ is/are allowed.

6)  Claim(s) 1-18 is/are rejected.

7)  Claim(s) \_\_\_\_\_ is/are objected to.

8)  Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

9)  The specification is objected to by the Examiner.

10)  The drawing(s) filed on \_\_\_\_\_ is/are: a)  accepted or b)  objected to by the Examiner.

    Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

    Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)  The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. §§ 119 and 120**

12)  Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a)  All b)  Some \* c)  None of:  
1.  Certified copies of the priority documents have been received.  
2.  Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3.  Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\* See the attached detailed Office action for a list of the certified copies not received.

13)  Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application) since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.  
a)  The translation of the foreign language provisional application has been received.

14)  Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121 since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

**Attachment(s)**

1)  Notice of References Cited (PTO-892)  
2)  Notice of Draftsperson's Patent Drawing Review (PTO-948)  
3)  Information Disclosure Statement(s) (PTO-1449) Paper No(s) 7,8 .  
4)  Interview Summary (PTO-413) Paper No(s). \_\_\_\_.  
5)  Notice of Informal Patent Application (PTO-152)  
6)  Other:

***Election/Restrictions***

1. Applicant's election with traverse of Group I, claims 1-18 in Paper No. 10 and 12 is acknowledged. The traversal is on the ground(s) that the searches are coextensive and the various configurations are so interrelated that it would be in the public's interest to allow applicant to prosecute all claims in the same application. This is not found persuasive because as previously presented there is a serious search burden associated with the examination of both the apparatus and article of manufacture with the method of manufacture. For example, searching for the article of manufacture would mandate a search in class 156/499 as well as the appropriate locals where devices for the manufacture of disposable absorbent articles are found (such as 156/494-496) the method claims at hand clearly do not require such a field of search. Additionally, the article of manufacture would be found in class 2 or class 604 and such search would be mandatory. Such additional searching is a serious burden on the Office. Applicant is additionally advised that there is an ADDITIONAL EXAMINATION BURDEN associated with the examination of apparatus, method and article of manufacture claims in the same application. For example, there are different requirements necessary in the examination of the different classes of invention, for example the material worked upon in an apparatus claim is of no patentable import and the method used to manufacture the article is of no import unless the manipulative steps can be shown to produce a materially different product. Such considerations for the different statutory classes of invention merits the necessity of the restriction requirement. Applicant's arguments have not been found to be persuasive.

The requirement is still deemed proper and is therefore made FINAL.

***Claim Rejections - 35 USC § 103***

2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.
3. Claims 1, 3, 7-10, 12, 14-18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Elsberg et al in view of Jessup for the same reasons as expressed in paper no. 6, paragraph 10.

As clearly established in paper no. 6, Jessup suggested that the use of the premature contraction of the elastic in the manufacturing line would have resulted in misalignment of the product during manufacture and could result in defective product manufacture, see column 1, lines 46-65 (note that in Jessup the particular example is a child's training pant, and clearly one viewing Elsberg would have understood the desirability of employing a delayed elastic which would contract after manufacture). The use of the elastics of Jessup in the waist region of the undergarments of Elsberg would have been obvious to those having ordinary skill in the art.

4. Claims 2, 4, 5, and 11 are rejected under 35 U.S.C. 103(a) as being unpatentable over the references as set forth above in paragraph 3 further taken with either one of Roland et al or Thorson et al for the same reasons as expressed in paper no. 6, paragraph 11.

5. Claims 6 and 13 are rejected under 35 U.S.C. 103(a) as being unpatentable over the references as set forth above in paragraph 3 further taken with any one Baird et al or Muckenfuhs et al (both newly cited).

The references as set forth above in paragraph 3, as addressed in paper no. 6, suggested all of the claimed features. While the references did not expressly suggest that the elastic material was retained in a compressed state and the compression relieved in order to allow for

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the retraction of the elastics, such was taken as conventional in the art at the time the invention was made. Applicant has challenged this in the response (i.e. that the retaining of elastics in a compressed state and relief of the compression resulted in the contraction of the elastics was not known at the time the invention was made and the Office has not supplied evidence to support this statement). As established in paper no. 6, one skilled in the art would have viewed retractive material which was held in an elastic state via compression and subsequently allowed to retract by relieve of the contraction as an alternative elastic material which was functionally equivalent to the heat shrinkable materials of Jessup. Applicant is advised that where, as here, two equivalents were known for their desired function, an express suggestion of the desirability of the substitution of one for the other is not needed to render such substitution obvious, In re Fout, 213 USPQ 532, In re Siebentritt, 152 USPQ 618. The references to each one of Baird et al or Muckenfuhs et al suggested that it was known to provide an elastic material which was restrained from contraction via retaining the elastic material in a compressed state and reliving the compression and/or compaction in order to retract the elastic material after manufacture of the disposable absorbent article, see Baird et al at column 2, lines 8-21, column 2, line 50-column 3, line 18, column 9, line 49-column 10, line 19 or Muckenfuhs et al at column 2, lines 30-48, column 13, line 64-column 14, line 35. Clearly, in the art of manufacturing a disposable absorbent article it was art recognized the compressed elastic which retracted after relief of the compression were known in the art at the time the invention was made as an alternative material to heat shrink elastics which were activated after formation of the absorbent articles. It would have been obvious to one of ordinary skill in the art at the time the invention was made to employ the constrained elastics material of either one of Baird et al or Muckenfuhs et al as such

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would have been viewed as an alternative material to that of the heat shrinkable materials of Jessup when manufacturing a disposable absorbent article.

*Response to Arguments*

6. Applicant's arguments filed October 6, 2003 have been fully considered but they are not persuasive.

The applicant argues that the examiner has failed to provide any suggestion or motivation to modify Elsberg with Jessup. This is not well taken. As clearly set forth above and as established in paper no. 6, one skilled in the art would have looked to the heat shrinkable waistband materials of Jessup as an alternative elastic waistband arrangement in Elsberg wherein the elastic was retracted after article formation whereby facilitating the manufacture of the undergarments which greater manufacturing precision (reduced error as a function of premature contraction during manufacture, column 1, lines 46-65 of Jessup). Additionally, note that the reference to Elsberg clearly suggested conventional materials for the undergarment and such would have been inclusive of the elastic waistbands of Jessup. Clearly there is ample motivation for one skilled in the art at the time the invention was made to incorporate the waistband materials of Jessup in the undergarments of Elsberg. The applicant is additionally advised that one cannot have hindsight where there are express reasons as to why one skilled in the art at the time the invention was made would have been led to make the combination. Thus it is abundantly clear that the Office did not utilize applicant's disclosure as a blueprint to derive the claimed invention (i.e. one would have been self motivated to employ the waistbands of Jessup in the manufacture of the undergarments of Elsberg.

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The applicant argues that the reference to Jessup provided a waistband which was partially elastic by providing regions which were elastic and other portions which were inelastic and that as such the reference taught away from use of such materials in Elsberg. The applicant is advised that there is no restrictions on the material employed for the waistband in Elsberg. Additionally, the use of the partially elastic waistband of Jessup would have afforded one the manufacturing advantages identified by Jessup. It should be noted that Jessup folded and seamed the undergarment prior to activation of the elastic portions of the waistband and is performing a similar manufacture to that of Elsberg. Applicant's argument that the claimed invention was taught away from is not understood.

Regarding claims 6 and 13, the applicant argues that the Office has a burden to provide the evidence which shows that the material of the elastic was in fact conventional. Applicant is advised that such is only necessarily provided where applicant challenges the presence and/or existence of such materials taken as conventional in the art and additionally provided some reason to believe that in their particular operation such conventional materials would not have been provided for. Applicant is nonetheless advised that the use of materials which are elastic and which contract upon relief of compression and/or compaction were in fact known in the art as evidenced by Baird et al or Muckenfuhs et al. the applicant is advised that these references were cited as a function of applicant's challenge as to whether such materials were conventional in the art or not. This is NOT a new ground of rejection, rather it is a rejection which was made as a function of applicant's challenge in the response as to whether the use of the specified elastic material was "well known and conventional" at the time the invention was made.

Additionally, the applicant is advised as set forth in paper no. 6, the use of an alternative elastic

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to the heat shrinkable materials of Jessup would have been obvious as such materials which retract upon relief of compression would have been viewed as functionally equivalent alternate expedients in the art (additionally such materials would have eliminated the need for use of heat in the process line which might otherwise adversely effect other layers in the undergarment).

Applicant did not expressly state that these materials were not known in the art, however, as evidenced above they certainly were known in the art and would have been employed for the reasons identified.

Regarding the "waistband to hip circumference ratio", the applicant argues that the examiner has "failed to indicate how Elsberg and Jessup, alone or in combination, teach or suggest the additional element of a waistband-to-hip circumference ratio." The applicant is advised that one skilled in the art of manufacturing an undergarment would have readily appreciated that the waistband would have been contracted as claimed to provide a better fit to the wearer (the reference to Jessup clearly is concerned with contraction of the waistband in order to provide improved fit to the wearer). One skilled in the art of undergarments would have provided the proper amount of elastic material (and /or elastic materials which were stretched to the desired degree) in order to facilitate the proper contraction in the waistband to provide a specified waistband to hip ratio. One skilled in the art would have additionally readily appreciated that the consumer would demand a specific waistband contraction in order to provide a desired fit. While the prior art did not measure the specific ratio identified, one would have expected to produce undergarments with the specific properties with none but the expected benefit of achieving a product which the consumer was capable of using. One cannot obtain a patent for that which is within the public domain. Simply because applicant chose to measure a

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parameter which has gone unmeasured prior to this application does not afford one with patentability of the measure parameter when one skilled in the art would have expected that undergarments manufactured according to the techniques of Jessup would have the requisite properties. The applicant is additionally advised that one skilled in the art of undergarment manufacture would have been driven to determine through routine experimentation to determine the specified ratio as such would have provided one with end products which the consumer would have preferred due to enhanced fit at the waist and hip of the undergarment. The applicant asserts that such is unsupported conclusion, however one skilled in the art of undergarment manufacture is not motivated to desire to produce products which the consumer will not purchase. As the waistband to hip ratio would have dictated the fit and comfort of the wearer, one skilled in the art would have certainly desired to determine the optimum fit for the end product. As Jessup is capable of providing varying degrees of contraction for the waistband by altering the amount of elastic in the same (as well as the degree of stretch of the same), it would have been within the skill level of the ordinary artisan to optimize the waistband to hip ratio as a function of the elastic in the waistband in order to make an undergarment which was consumer accepted. Applicant's arguments to the contrary are not persuasive (it should be noted that the waistband to hip ratio was a function of the elastic in the waistband and one skilled in the art would have understood how to manipulate such a variable to attain the desired result without undue experimentation).

Regarding Roland et al or Thorson et al, the applicant is advised that the references as set forth above suggested the claimed invention as defined in the independent claims. It should be noted that the references to Roland et al or Thorson et al both clearly applied the heated air upon

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the waist section of the undergarments as opposed to equally where the waistband and hip section of the undergarment was disposed past the heating mechanism. The applicant is therefore advised that the prior art clearly expressed greater heated air in the waist section of the undergarment as well as greater amount of heat (higher temperature) to the waist as opposed to the hip section of the undergarment. The applicant's argument that it is not seen where such is taught in the references is not understood as the material passes over the heating mechanisms, the waist sections is what was exposed to the heat primarily and thus the hip sections are not exposed to excess and as much heating.

No claims are allowed.

***Conclusion***

7. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

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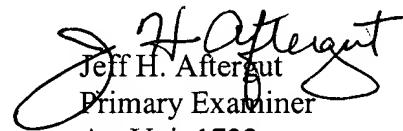
Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jeff H. Aftergut whose telephone number is 703-308-2069. After

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December 19, 2003, the examiner can be reached at 571-272-1212. The examiner can normally be reached on Monday-Friday 6:30-3:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Richard Crispino can be reached on 703-308-3853. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0661.

  
Jeff H. Aftberg  
Primary Examiner  
Art Unit 1733

JHA  
November 9, 2003